

CLERKS - Provision of the Open-space Land and Voluntary Conservation Easement Act delaying recordation of conservation easements until county planning agency completes review does not apply to conservation easements acquired or created by the United States under federal law;

COUNTIES - Provision of the Open-space Land and Voluntary Conservation Easement Act dictating duration of conservation easements and delaying recordation of conservation easements until county planning agency completes review do not apply to conservation easements acquired or created by the United States under federal law;

LAND USE - Provision of the Open-space Land and Voluntary Conservation Easement Act dictating duration of conservation easements and delaying recordation of conservation easements until county planning agency completes review does not apply to conservation easements acquired or created by the United States under federal law;

PUBLIC LANDS - Provision of the Open-space Land and Voluntary Conservation Easement Act dictation duration of conservation easements and delaying recordation of conservation easements until county planning agency completes review does not apply to conservation easements acquired or created by the United States under federal law;

STATUTORY CONSTRUCTION - Where meaning of statute is unclear, construction that avoids potential constitutional infirmity is preferred;

MONTANA CODE ANNOTATED - Title 70, chapter 30; Title 76, chapter 6; sections 1-3-232, 70-21-201, -302, 76-6-102, -103(2), -104(4), -105, (2), -202, -203(1), -205, -206, -207;

UNITED STATES CODE - 16 U.S.C. § 3837a(a)(3);

UNITED STATES CONSTITUTION - Article IV, section 3, clause 2; article VI, clause 2.

HELD: Montana Code Annotated §§ 76-6-202, 76-6-206 and 76-6-207 do not apply to conservation easements acquired or created by federal agencies pursuant to federal law.

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Mr. Joe Coble
Teton County Attorney
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Dear Mr. Coble:

[P1] You have requested my opinion on a question I have rephrased as follows:

Do the requirements of Mont. Code Ann. §§ 76-6-202, 76-6-206 and 76-6-207 apply to agencies of the federal government?

[P2] Montana Code Annotated Title 76, chapter 6, the “Open-Space Land and Voluntary Conservation Easements Act (“the Act”), deals with the creation of conservation easements. It provides a procedure by which “public bodies” and “qualifying private organizations,” both terms defined by the code, may participate in a real estate transaction resulting in the creation of a “conservation easement,” defined as:

an easement or restriction, running with the land and assignable, whereby an owner of land voluntarily relinquishes to the holder of such easement or restriction any or all rights to construct improvements upon the land or to substantially alter the natural character of the land or to permit the construction of improvements upon the land or the substantial alteration of the natural character of the land, except as this right is expressly reserved in the instruments evidencing the easement or restriction.

Federal agencies also participate in the creation of conservation easements under the authority of federal statutes. See, e.g., 16 U.S.C. § 3837a(a)(3) (creation of easements by U.S. Fish and Wildlife Service).

[P3] The Act defines the terms “public body” and “qualified private organization” in ways that exclude their application to the federal government. Mont. Code Ann. § 76-6-104(4) (“‘Public body’ means the state, counties, cities, towns, and other municipalities.”); (5) (defining “Qualified private organization” as a non-governmental entity). The scope of provisions relating specifically to these defined terms must be limited by the definitions of the two terms and cannot be extended to a federal agency based on the plain language of the definitions.

[P4] This analysis does not, however, completely answer your question. The Act applies to any entity that fits the definition of “public body” or “qualified private organization.” But, what of the few provisions of the Act that do not incorporate the defined terms? The Act clearly does not intend to occupy the field of conservation easements.

The powers conferred by this chapter are in addition and supplemental to the powers conferred by any other law. *** This chapter may not be construed to imply that any easement, covenant, condition, or restriction that does not have the benefit of this chapter is not enforceable based on any provisions of this chapter. This chapter does not diminish the powers granted by any general or special law to acquire by purchase, gift, eminent domain pursuant to Title 70, chapter 30, or otherwise and to use land for public purposes.

Mont. Code Ann. § 76-6-105. Its purpose is extraordinarily broad. In addition to “authoriz[ing] and enabl[ing] public bodies and certain qualifying private organizations” to create conservation easements, the Act seeks to “provide for the preservation of other open-space land anywhere in the state. . . .” Mont. Code Ann. § 76-6-103(2). The extensive findings set forth in Mont. Code Ann. § 76-6-102 generally can be applied with equal force to any conservation easement, whether created under the Act or not.

[P5] Only three sections of the Act do not contain language that either specifically refers to the defined terms or limits the reach of a section with language pertaining, for example, to actions taken “for the purposes of this chapter,” see, e.g., Mont. Code Ann. § 76-6-205 (dealing with assignment of easements “[f]or the purposes of this chapter”), or “under this chapter,” see, e.g., Mont. Code Ann. § 76-6-203(1) (describing actions that may be prohibited under easements created “under this chapter.”). Montana Code Annotated § 76-6-202 limits the duration of conservation easements to a minimum of fifteen years and provides that any such easement not created in perpetuity may be renewed for a minimum term of fifteen years. Montana Code Annotated § 76-6-206 provides that “all conservation easements” must be subject to review by the local planning authority for the county and cannot be recorded until the review is complete. And, Mont. Code Ann. § 76-6-207 provides that the easement is to be recorded in the county where the land lies in the same way that other property documents are recorded, see Mont. Code Ann. §§ 70-21-201 et seq. (generally describing recordation of real property documents).

[P6] Your questions are specific to the operation of Mont. Code Ann. §§ 76-6-206 and -207. Section -207 requires that conservation easements be recorded in the counties in which the affected land lies. Section -206, however, delays the recordation of conservation easements until they have been reviewed by the county land use planning agency “[i]n order to minimize conflict with local comprehensive planning.” The statute makes it the duty of the grantee of the conservation easement to present it to the local planning agency, and the agency then has 90 days within which to review and provide nonbinding comments on the conservation easement. The clerk and recorder may not record the conservation easement until the county planning agency has provided its comments or 90 days has elapsed, whichever comes first.

[P7] Given that the legislature understood that other laws might exist providing for the preservation of open space through conservation easements, and specifically intended to respect those laws, it is highly unlikely that it would have limited the reach of almost, but not quite, all of the Act only to conservation easements created under it, while attempting in a few sections to regulate other kinds of such easements. It is more plausible to conclude that the legislature passed the Act to permit state and local agencies and certain non-profits to create conservation easements of a particular kind in a specified way, while leaving easements created under other law alone. Indeed, it is hard to reach any other conclusion in light of the savings clause found in Mont. Code Ann. § 76-6-105(2), quoted above.

[P8] The latter interpretation also has the benefit of avoiding potential conflict with federal law. It is well-established that where two interpretations of a law are available, one of which presents a potential constitutional issue and the other of which does not, the construction that avoids the constitutional issue is to be preferred. Confederated Salish and Kootenai Tribes v. Clinch, 1999 MT 342, ¶¶ 25-27, 297 Mont. 448, 992 P.2d 244; Mont. Code Ann. § 1-3-232 (an interpretation that gives effect is to be preferred over one that renders void).

[P9] While regulation of property rights is generally a police power function of the state and local governments, states and local governments may not regulate in a way that impedes a federal agency from achieving the objectives set forth in federal law. Kleppe v. New Mexico, 426 U.S. 529, 543 (1976) (“Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. . . . And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.” (citations omitted)).

[P10] It is hard to imagine an instance in which the recordation requirements of Mont. Code Ann. § 76-6-207 could conflict with federal law. Recordation of property interests in the counties in which the property lies benefits the holder of the property interest by defeating claims of lack of notice by other parties. Mont. Code Ann. § 70-21-302 (recording provides constructive notice to subsequent purchasers and mortgagees). The local clerk and recorder may record a conservation easement, as an “instrument affecting the title to or possession of real property,” under the authority of Mont. Code Ann. § 70-21-201, whether required by Mont. Code Ann. § 76-6-207 or not. Recordation or lack thereof under Mont. Code Ann. § 76-6-207 does not affect the validity of the easement. Mont. Code Ann. § 76-6-105(2) (failure to comply with the Act does not affect the validity of a conservation easement). By holding that Mont. Code Ann. § 76-6-207 does not apply to a conservation easement under federal law, I simply leave the decisions regarding recordation to the sound discretion of federal property managers.

[P11] The same cannot be said, however, for the limitations on duration set forth in Mont. Code Ann. § 76-6-202 and the delay in recording provided in 76-6-206. It is up to Congress and federal land managers to determine what duration of federally created conservation easement best serves the national interest. Application of the standards set forth in Mont. Code Ann. § 76-6-202 could well conflict with the judgments made by federal officials. A requirement that recordation of a federal conservation interest be delayed for county review certainly advances a legitimate state purpose, but there could be instances where federal officials have reason to desire earlier recordation. A holding that federal officials must in all cases delay recordation could conceivably conflict with the judgment of federal land managers as to what best serves the federal interest.

[P12] Holding that the parts of the Act that do not specifically refer to “public bodies” or “qualified private organizations” do not apply to conservation easements created or acquired by federal agencies under federal law avoids the need for a potentially cumbersome case-by-case determination of whether application of the statutes stands as such an obstacle to the achievement of the federal government’s purposes that the application of the statute is preempted under the Supremacy Clause of the federal constitution, U.S. Const. arts. IV, § 3, cl. 2; VI, cl. 2. That construction is therefore preferred. Because the Attorney General does not comment on the constitutionality of statutes, I express no opinion as to whether the application of any provision of the Act would conflict sufficiently with federal law to trigger preemption.

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THEREFORE, IT IS MY OPINION:

Montana Code Annotated §§ 76-6-202, 76-6-206 and 76-6-207 do not apply to conservation easements acquired or created by federal agencies pursuant to federal law.

Sincerely,

STEVE BULLOCK
Attorney General

sb/cdt/jym